No. 20A96

In The
Supreme Court of the United States

DANVILLE CHRISTIAN ACADEMY, INC., ET AL., *Applicants*,
v.
ANDY BESHEAR, GOVERNOR OF KENTUCKY,
Respondent.

ON EMERGENCY APPLICATION TO VACATE THE PRELIMINARY INJUNCTION TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT

MOTION BY CHURCH-STATE SCHOLARS, WITH ATTACHED PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, FOR LEAVE (1) TO FILE THE BRIEF, (2) IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES

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DECEMBER 4, 2020

MOTION BY CHURCH-STATE SCHOLARS, WITH ATTACHED PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, FOR LEAVE (1) TO FILE THE BRIEF, (2) IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES[1]

Movants, Church-State scholars with substantial expertise in the Religion Clauses, respectfully request leave of the Court to (1) file the attached amicus curiae brief in support of respondent and in opposition to applicants' emergency application to vacate the writ of injunction, (2) file the brief in an unbound format on 8½-by-11-inch paper, and (3) file the brief without ten days' advance notice to the parties.

Positions of the Parties

Counsel for Applicants and Respondent have indicated that neither party opposes this motion.

Identities of Amici

Amici are Church-State scholars with substantial expertise in the Religion Clauses. A full list of amici is attached as an appendix to this brief.

[1] No counsel for a party authored this motion or the proposed brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to its preparation or submission. The parties do not oppose the filing of this motion or brief.

Interest of Amici; Summary of Brief

Amici submit this brief to explain why the Free Exercise Clause claim advanced by Applicants lacks merit, and to caution that the preliminary injunction issued by the district court violates the Establishment Clause.

Format and Timing of Filing

Applicants filed their emergency application on December 1, 2020. In light of the December 4, 2020 deadline for responding to the application, there was insufficient time for the proposed amici to prepare their brief for printing and filing in booklet form, as ordinarily required by Supreme Court Rule 33.1. Nor were the proposed amici able to provide the parties with ten days' notice of their intent to file the attached brief, as ordinarily required by Rule 37.2(a).

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For the above reasons, the proposed amici respectfully request that the Court grant this motion to file the attached proposed amicus brief and accept it in the format and at the time submitted.

Respectfully submitted,

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BRIEF OF CHURCH-STATE SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF CHURCH-STATE SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT[1]

INTERESTS OF AMICI CURIAE

Amici are Church-State scholars with substantial expertise in the Religion Clauses. A full list of amici is attached as an appendix to this brief.

Amici submit this brief to explain why the Free Exercise Clause claim advanced by Applicants lacks merit, and to caution that the preliminary injunction issued by the district court violates the Establishment Clause.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission. The parties do not oppose the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Applicants ask this Court to dramatically rewrite its free exercise doctrine—and to do so on a rush basis to resolve their emergency motion. Making matters worse, they ask for reinstatement of a preliminary injunction that itself violates the Establishment Clause. The Court should decline those invitations. Like the court of appeals, the Court should instead apply settled law—*Employment Division v. Smith*, 494 U.S. 872 (1990), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *City of Boerne v. Flores*, 521 U.S. 507 (1997)—and deny the application.

This Court's decisions make clear that the key question under the Free Exercise Clause is whether government action has the "object or purpose," and not just the "incidental" effect, of burdening religion. *Id.* at 531. The answer to that question here is clearly and dispositively no. Governor Beshear's order treats all K-12 schools, whether religious or secular, the same. It treats all preschools, whether religious or secular, the same. And it treats all colleges, whether religious or secular, the same.

Applicants do not contest that basic fact, which dooms their claim under existing law. Instead, they attack Governor Beshear's decision for regulating K-12 schools differently than other entities, particularly preschools. But no provision of the Constitution prohibits disparate treatment between different education levels. In

an attempt to overcome that fatal problem and frame their claim as one arising under the Free Exercise Clause, Applicants conflate (1) incidental burdens on religion flowing from *religiously neutral* regulatory distinctions among categories, which will always have the effect of "favoring" some category, with (2) *religious targeting*. If this conception of the Free Exercise Clause becomes law, the federal judiciary would be compelled to micromanage countless regulatory decisions—all in the midst of a raging pandemic—via the application of strict scrutiny. Such a significant change in settled law should come only after full briefing and plenary consideration—not through emergency action on the Court's shadow docket.

The Sixth Circuit's stay should remain for another reason: It stopped enforcement of an unconstitutional injunction. Governor Beshear's executive order applies to all elementary, middle, and high schools, regardless of religious affiliation. But the district court enjoined its application only to religious schools. That injunction violates the Establishment Clause.

No government authority may extend a benefit or withdraw a burden from a class of people based solely on religious status when critically important rights are implicated for both groups. Decades of this Court's Establishment Clause jurisprudence make that clear. The state may extend such benefits or burdens to religious and nonreligious organizations alike. Or it may grant exclusive religious accommodations when nonreligious groups have no comparable rights at stake. What

it cannot do is systematically privilege religious interests and disadvantage equally important nonreligious ones.

That stark, religion-based sorting is precisely the effect of the district court's injunction. *All* parents in Kentucky have important constitutional interests in securing in-person education for their children. By subordinating some of those interests to others on the basis of religious status alone, the district court effectuated an establishment of religion. If the Establishment Clause means anything, it is that the government cannot give religious institutions alone a legal monopoly on a vital public good.

The Religion Clauses of the First Amendment are sometimes thought to be in tension with one another. But here there is no conflict, and the two clauses are mutually reinforcing. The Free Exercise Clause forbids discrimination against religion, and the Establishment Clause prohibits discrimination in favor of it. Because Governor Beshear's order did not discriminate on the basis of religion, and because the district court's injunction did, both clauses support the same conclusion: The application should be denied.

ARGUMENT

I. THE EXECUTIVE ORDER DOES NOT VIOLATE APPLICANTS' FREE EXERCISE RIGHTS

Under settled law, the Executive Order does not implicate the Free Exercise Clause. It is a neutral order of general applicability and does not target religious practice. It is thus a constitutionally permitted exercise of the governor's broad authority to protect public health.

A. The Question Under The Free Exercise Clause Is Whether Government Action Has The "Object" Of Burdening Religion

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that "if prohibiting the exercise of religion * * * is not the object" of a governmental action, "but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878. Applying *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court invalidated a series of municipal ordinances because they *did* have "an impermissible object" and "were pursued only with respect to conduct motivated by religious beliefs." *Id.* at 524. The Court then reiterated in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the Free Exercise Clause reaches only laws that have the impermissible object of discriminating against religion. The *Boerne* Court found that the Religious Freedom Restoration Act of 1993 ("RFRA") was not appropriate legislation to enforce the Free Exercise Clause precisely because "Congress' concern" in passing RFRA was "*not* the object or purpose" of state legislation, but rather "the

incidental burdens imposed" by that legislation. *Id.* at 531 (emphasis added); *see id.* at 534 (explaining that the problem with RFRA was that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had *the object of stifling or punishing free exercise*") (emphasis added).

As the Sixth Circuit correctly concluded, these settled principles dictate the outcome here. "Executive Order 2020-969 applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise." App. 5. "[I]t is therefore neutral and of general applicability and need not be justified by a compelling governmental interest." App. 5. There is no evidence that prohibiting religious exercise was Governor Beshear's purpose or object in issuing the executive order. That should end the inquiry.

Applicants cite *Smith* only once (and *City of Boerne* not at all). Relying instead on law review articles and non-majority opinions associated with shadow-docket orders, they argue for a significant expansion of a "most favored nation" theory of religious exemptions. Application 12-13. That approach is foreclosed by settled precedent.

B. The "Most Favored Nation" Theory Of Religious Exemptions Is Inconsistent With *Smith*

Smith emphasized that "[t]he First Amendment's protection of religious liberty does not require" application of the compelling interest test to laws "of almost every conceivable kind." 494 U.S. at 888-89. Yet the most favored nation theory—which

holds that mere presence of secular regulatory exemptions triggers strict scrutiny—mandates precisely that. The theory's proponents have been candid about its dramatic consequences. *See* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 B.Y.U. L. Rev. 167, 173 (2019) ("[T]hink about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are."); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187, 195 (2001) ("[I]f the presence of just one secular exception means that a religious claim for exemption wins as well [absent a compelling interest], the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws."); *see generally* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 Wis. L. Rev. 689, 731 (2019) (noting that, "despite the fact that the *Smith* Court specifically cited laws 'providing for equality of opportunity for the races' as examples of generally applicable laws to which strict scrutiny should *not* apply," the most favored nation theory "*would* apply such strict scrutiny" to such laws because they have small-employer exemptions) (emphasis in original).

Given the incompatibility of the most favored nation theory of religious exemptions with *Smith*, it is not surprising that it has been rejected by several lower courts. *See*, *e.g.*, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) ("Consistent with the majority of our sister circuits, * * * we have

already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption.").[2] The theory has also been subject to criticism by commentators, including those who support judicially administered religious exemptions. *See, e.g.,* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 664 (2003) (describing the most favored nation approach as "an unprincipled and bizarre manner of distributing constitutional exemptions").[3]

That criticism is warranted. Proponents of the most favored nation theory misunderstand the purpose of the doctrinal concern with individualized exemptions. That concern was first articulated in the plurality opinion in *Bowen v. Roy*, 476 U.S. 693 (1986), from which the *Smith* Court adopted it. *See Smith*, 494 U.S. at 884. The

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[2] *See also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("General applicability does not mean absolute universality. Exceptions do not negate that [laws] are generally applicable."); *Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield*, 853 F. Supp. 2d 214, 223 (D. Conn. 2012) ("The fact that a law contains particular exceptions does not cause the law not to be generally applicable, so long as the exceptions are broad, objective categories, and not based on religious animus.").

[3] *See also* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 199 (2002) (concluding that "the very foundation for the most favored nation framework is intellectually incoherent" and that "[t]here are too many conceptual and practical problems with [the theory] for it to be accepted"); Oleske, *supra*, at 739 (concluding that the theory is "fundamentally inconsistent with the Court's current understanding of the Free Exercise Clause"); Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party at 27, *Fulton v. City of Philadelphia*, No. 19-123 (S. Ct. argued Nov. 4, 2020) ("[I]f the presence of the exceptions were seen as making the statute no longer 'generally applicable' for *Employment Division v. Smith* purposes," it "would require more than just the application of strict scrutiny to religious exemption requests: It would also mean that the laws would often be seen as failing strict scrutiny, precisely because of their underinclusiveness.").

Roy plurality's concern with discretionary individualized-exemption schemes was not their mere existence but instead the prospect of their use as a vehicle for *intentional* discrimination. 476 U.S. at 708 ("If a state creates such a mechanism [for "individualized exemptions"], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent.").

Applicants have attempted to invoke the language in this Court's cases about mechanisms for "individualized exemptions." Application 18-19. But it is inapplicable here. The executive order includes no individualized exemptions; it applies to all schools, religious or not.

The governor's closure of all schools (religious and secular alike) obviously demonstrates no discriminatory intent. Enlisting provisions unrelated to schools to draw an inference of bad intent is utterly untethered to existing doctrine. The *Roy* plurality explained that it "suggests a discriminatory intent" for the government to deny exemptions for religious hardship if it otherwise allows individual exemptions under a "good cause" standard. 476 U.S. at 708 (quoting *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). This concern mirrors one the Court has articulated in the free speech context, where it has warned that the delegation of "overly broad licensing discretion * * * 'has the potential for becoming a means for suppressing a particular point of view.'" *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992). But the *Roy* plurality sharply distinguished

cases involving individualized-exemption schemes from those where "there is nothing whatever suggesting antagonism by [government] towards religion generally or towards any particular religious beliefs." 476 U.S. at 708. Thus, the individualized-exemption rule provides no support for a broader most favored nation rule that sweeps beyond situations that are suggestive of discriminatory intent.

The most favored nation theory is also inconsistent with this Court's decision in *Lukumi*, which found a free exercise violation because of religious targeting. Proponents of most favored nation theory nonetheless read that decision's analysis of whether a regulation is "generally applicable" as not turning on whether religion is targeted. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 6 (2016). This reading, however, cannot be reconciled with what this Court actually said in *Lukumi*. The first paragraph of the general applicability section in *Lukumi* states that "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only against conduct with a religious motivation*." 508 U.S. at 542-43 (emphasis added). The second paragraph reiterates that the government "cannot in a *selective manner* impose burdens *only on conduct motivated by religious belief*." *Id.* at 543 (emphasis added). The third paragraph highlights that the ordinances under review were "*drafted with care* to forbid few killings but those occasioned by religious sacrifice." *Ibid.* (emphasis added). The fourth paragraph concludes that the city had

failed to explain "why *religion alone* must bear the burden of the ordinances." *Id*. at 544. The fifth paragraph notes that the city pursues its interest "*only* when it results from religious exercise." *Id*. at 545 (emphasis added). And the section concludes by finding that "each of [the] ordinances pursues the city's governmental interests *only* against conduct motivated by religious belief." *Ibid*. (emphasis added); *see also id*. at 557 (Scalia, J., concurring) (explaining that "the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement *target* the practices of a particular religion for discriminatory treatment") (emphasis added).

Ignoring this pervasive focus on targeting in *Lukumi*'s general applicability section, proponents of the most favored nation approach place principal reliance on the second sentence in the following passage:

> The ordinances are underinclusive for those ends [of protecting public health and preventing cruelty to animals]. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.

Id. at 543. This passage lays out two steps for determining if a law is non-generally applicable, but proponents of the most favored nation approach typically conflate them. The first step is to determine if a law is underinclusive, which the Court does by examining whether it "fail[s] to prohibit nonreligious conduct that endangers"

state interests "in a similar or greater degree" as a requested religious exemption. But underinclusion alone does not render a law non-generally applicable. The critical next step is determining whether the nature and degree of underinclusion is so "substantial" that it suggests the regulation was "drafted with care" to target religious practice. *Id.*; *see also Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 701-02 (9th Cir. 1999) ("Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister."), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134, 1137 (9th Cir. 2000). *City of Boerne* confirms that the existence of exemptions not suggestive of discriminatory intent cannot be the basis for a free exercise claim. That decision made clear that Congress could not enforce the Free Exercise Clause by requiring exemptions to state laws "without regard to whether they had *the object of stifling or punishing free exercise*." 521 U.S. at 534 (emphasis added).

Nor are Applicants correct that the commonsense inclusion of religious schools in a larger regulated category (all K-12 schools) must be subject to searching inquiry. Application at 24. "Here, religious schools are in the category of 'K–12 schools' because the reasons for suspending in-person instruction apply precisely the same to them." App. 6 (*citing Church of Lukumi*, 508 U.S. at 543). Critically, applicants do not dispute that conclusion or contend that religious schools are somehow less susceptible to COVID-19 than their secular counterparts. Instead, they effectively

contend that the Executive Order's distinction between *all* K-12 schools (religious and non-religious) and other entities does not withstand scrutiny. That is incorrect, *see* App. 3 (noting governor's conclusion that "elementary and secondary schools pose unique problems"), but also beside the point.

The Free Exercise Clause is not concerned with discrimination against schools as schools. So the comparisons between schools and non-schools (or primary/secondary schools and preschools) on which applicants' argument turns is irrelevant. They offer no reason why *religious* schools do not belong in the broader category of all schools and no evidence that *religious* schools have been targeted for disfavorable treatment. That means the order need not satisfy strict scrutiny. App. 7 (requirement that an order be "narrowly tailored to advance a compelling governmental interest * * * applies only if the challenged restriction is not neutral and generally applicable").

Lastly, this Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* is consistent with the requirement that a law have a discriminatory object in order to run afoul of the Free Exercise Clause. No. 20A87, 2020 WL 6948354 (S. Ct. Nov. 25, 2020). In *Diocese*, the Court did not overrule *Smith;* nor did it adopt the most favored nation theory proposed by other members of the Court. Instead, the majority rejected an order with a facial religious classification on the grounds that it "single[d] out houses of worship for especially harsh treatment." *Id.* at *1. That is

not the case here—the Executive Order does not differentiate between religious and non-religious schools. App. 5-6.

II. THE DISTRICT COURT'S PRELIMINARY INJUNCTION VIOLATES THE ESTABLISHMENT CLAUSE

Even if Applicants were entitled to some form of relief from Governor Beshear's executive orders, and even if this Court adopted a most favored nation theory of free exercise, the district court's chosen remedy is unconstitutional. That court enjoined the governor from enforcing the Executive Order against religious schools—and *only* religious schools. App. 30. Whether legislative, executive, or judicial, no government authority may systematically privilege religious groups over their non-religious counterparts when comparable vital interests are at stake.

While religious accommodations are permissible in many situations, this is not one of them. At some point, exemptions confer a sufficiently large benefit on religion as to violate the Establishment Clause. Non-religious schools and the families that attend them have strong First and Fourteenth Amendment rights in school attendance. And non-religious parents should not be pressured into sending their children to religious schools to receive in-person instruction.

The district court's religious status-based discrimination against those interests conflicts with decades of this Court's Establishment Clause jurisprudence. This is a limit case. If the Establishment Clause means anything, it must prohibit a

simple and direct favoring of religious interests over equally vital and constitutionally protected secular interests. The preliminary injunction must not be reinstated.

A. The District Court's Order Privileges Religious Schools Over Their Non-Religious Counterparts

Executive Order 2020-969 provides in part that "[a]ll public and private elementary, middle, and high schools (kindergarten through grade 12) shall cease in-person instruction and transition to remote or virtual instruction beginning November 23, 2020." App. 73. The district court enjoined the enforcement of that order "with respect to any religious private school in Kentucky that adheres to applicable social distancing and hygiene guidelines." App. 30.

To be clear: the district court's order exempts private religious schools—and *only* private religious schools—from the prohibition on in-person instruction. Secular schools, both private and public, would remain shuttered. If reinstated, the district court's order will allow the Lexington Christian Academy to open its doors, but not the Lexington School. In this way, the order systematically favors a class of religious schools and their attendants over their nonreligious counterparts. It is no different than if the governor himself ordered only nonreligious schools to close.

B. The Establishment Clause Prohibits The Government From Providing Exemptions That Systematically Privilege Religious Interests Over Comparable Nonreligious Interests

The Establishment Clause prohibits the government from making any law "respecting an establishment of religion." U.S. Const. amend. I. "The core notion

animating" that prohibition "is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion). Indeed, "[t]he general principle that civil power must be exercised in a manner neutral to religion * * * is well grounded in [this Court's] case law." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

In *Texas Monthly*, this Court invalidated a sales tax exemption for religious periodicals that did not extend to comparable secular publications. 489 U.S. at 14. While no opinion gained majority support, the plurality and concurring Justices agreed that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." *Id.* at 28 (Blackmun, J., concurring in the judgment); *accord id.* at 17 ("Because Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief, the exemption manifestly" violates the Establishment Clause.) (plurality op.).

To be sure, Texas could have "sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life" if the

incentives it offered were "available to an extended range of associations whose publications were substantially devoted to such matters," and not only those dealing with religious matters or promoting religious faith. *Id.* at 16; *see id.* at 27-28 (Blackmun, J., concurring in the judgment) (noting that a state could permissibly "exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong"). But Texas could not benefit religious publications without benefitting directly comparable secular publications.

Similarly, in *Kiryas Joel*, the Court held that New York "crosse[d] the line from permissible accommodation to impermissible establishment" when it created a special separate school district for the Satmar Hasidic community. 512 U.S. at 710. This type of accommodation was constitutionally defective because it conflicted with "safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion." *Id.* at 703. Because neutrality is an animating principle in Establishment Clause cases, the Court explained that "the general availability of any benefit provided religious groups or individuals" is a crucial factor on which Courts must often rely. *Id.* at 704.

And in *Welsh v. United States*, the Court held that a statute exempting only religious pacifists from compulsory military service must be read to include

nonreligious pacifists. 398 U.S. 333, 357–58 (1970). While the plurality opinion relied primarily on statutory interpretation, Justice Harlan's concurrence recognized that the Establishment Clause compelled the same result. *Id.* at 343-344, 357-361. As Justice Harlan explained, the government cannot, consistent with Establishment Clause principles, privilege one set of sincerely held pacifist beliefs over another by "draw[ing] the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other." *Id.* at 356. Indeed, egregious disparate treatment on the basis of religious status is precisely the "kind of classification that this Court has condemned." *Id.* at 357-58; *see* Nelson Tebbe, *Religious Freedom in an Egalitarian Age* 71-79 (2017).

As this Court has interpreted the Establishment Clause, the principle of religious neutrality runs both ways. In *Everson v. Board of Education of Ewing*, the Court explained that a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 330 U.S. 1, 16 (1947). The same reasoning informed this Court's recent decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, which held on Free Exercise grounds that Missouri could not categorically deny playground resurfacing grants to religiously affiliated applicants. 137 S. Ct. 2012, 2019-20 (2017) (quoting *Everson*, 330 U.S. at 67). And as this Court has

explained, relying explicitly on *Texas Monthly*, "incur[ing] a cost or be[ing] denied a benefit on account of * * * religion" is one of the central ways in which Establishment Clause plaintiffs may demonstrate injury for purposes of standing. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011) (citing *Tex. Monthly*, 489 U.S. at 8 (plurality op.)); *see Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2102-03 (2019) (Gorsuch, J., concurring in the judgment).

The principle of religious neutrality allows the government to accommodate religious groups where equivalent benefits are also extended to non-religious groups. In *Walz v. Tax Comm'n,* for example, the Court upheld a tax exemption for religious properties in part because New York had "not singled out one particular church or religious group or even churches as such," but rather had exempted "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." 397 U.S. 664, 672-73 (1970); *see Bowen v. Kendrick,* 487 U.S. 589, 608 (1988) (upholding a statute enlisting a "wide spectrum of organizations" in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular institution").

The Establishment Clause also permits some religious accommodations that do not benefit nonreligious actors. As this Court has often said, "there is room for play in the joints" between the Religion Clauses. Some accommodations are neither

compelled by the Free Exercise Clause nor forbidden by the Establishment Clause. *Walz*, 397 U.S. at 669. For example, in *Cutter v. Wilkinson,* the Court rejected an Establishment Clause challenge to heightened protections for prisoners under the Religious Land Use and Institutionalized Persons Act, noting that "[r]eligious accommodations * * * need not 'come packaged with benefits to secular entities.'" 544 U.S. 709, 724 (2005) (citation omitted). While "[a]n accommodation must be measured so that it does not override other significant interests," there often is no comparable nonreligious interest at stake in religious accommodations. *Id*. at 710, 724 (giving the example of "[c]ongressional permission for members of the military to wear religious apparel while in uniform"). Even where a nonreligious interest does exist and is not accommodated, the Establishment Clause may not necessarily be implicated.

But there comes a point at which disparate treatment of religious and nonreligious actors is fundamentally incompatible with Establishment Clause principles. That may be when exclusion from an accommodation implicates some other significant right or interest, such as freedom of speech (*Tex. Monthly*), education (*Kiryas Joel*), or conscience (*Welsh*).[4] Religious accommodations may also raise

[4] In *Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Circ. 2020), the Seventh Circuit rejected a free speech challenge to COVID-related public health regulations that favored religious over political speech. *Id*. at 771. But the Republican Party failed to raise—and the court did not address—a *Texas Monthly* objection under the Establishment Clause. *Id*. at 764 ("Normally, parties challenging a state

Establishment Clause concerns when they afford or deny a particularly important public benefit.

When the state favors religious groups over nonreligious groups with comparable rights and interests, it contravenes the principle of religious neutrality. On one view of that principle, government should avoid, as much as possible, pressuring people to either abandon or adopt religious views. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality*, 39 DEPAUL L. REV. 993, 1001-02 (1990) ("[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."). When a religious exemption is extremely beneficial, or exclusion from it is extremely burdensome, the exemption itself can encourage religious practice by providing overwhelming incentives to qualify for it.

If nothing else, the Establishment Clause prohibits the state from giving religious institutions a legal monopoly on a widely desired public good such as in-person K-12 education. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) ("The Framers did not set up a system of government in which important,

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measure that appears to advantage religion invoke the Establishment Clause of the First Amendment," but "[t]hat is emphatically not the theory that the Republicans are pursuing. We eliminated any doubt on that score at oral argument, where counsel assured us that this was not their position.").

discretionary governmental powers would be delegated to or shared with religious institutions.").

C. Exempting Only Religious Schools From Governor Beshear's Executive Order Violates The Establishment Clause

The district court's injunction violates the Establishment Clause by impermissibly privileging Kentucky's religious schools and those who attend them over their nonreligious counterparts.

As in *Texas Monthly*, *Kiryas Joel*, and *Welsh*, the district court injunction that Applicants seek to restore would provide a constitutionally significant benefit only to religious actors, while depriving nonreligious citizens of an equivalent benefit. All parents and guardians, not just those with children enrolled in religious schools, have a constitutional right to "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925). Schooling implicates other constitutional rights as well, including speech and association rights. *See* Proposed Amicus Brief of Kentucky Religious Schools and Parents In Support of Applicants at 12-13.

Those parental rights could not negate the governor's power to close schools in order to save lives and stop the spread of disease. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 38 (1905) (The Constitution places "[t]he safety and the health of the people" in the hands of state officials "to guard and protect."). And the district court certainly cannot privilege those rights only in families who choose to

send their children to religious schools. To hold otherwise would bar all other Kentucky parents "*because of their faith, or lack of it*, from receiving the benefits of public welfare." *Trinity Lutheran*, 137 S. Ct. at 2020 (emphasis in original). That is especially problematic where, as here, the burdens on religious and nonreligious parents, children, and schools are the same—all of them are subject to the same school closure order.

Compounding the constitutional defect, the district court's injunction would incentivize some parents to seek religious education. If the only available in-person schools are religious, many nonreligious parents will face overwhelming pressure to enroll their children in those schools, regardless of whether they wish their children to receive religious instruction. Many parents, especially those whose jobs cannot accommodate working from home or those whose children have special needs, desperately need in-person schooling. If religious schools are the only such option, parents may conclude they have no choice but to take it. *See* Ellen Barry, *U.S. public school enrollment drops as parents, frustrated by lockdown, pull their children out*, N.Y. TIMES (Nov. 27, 2020).[5] Such an "unyielding weighting in favor of" religion that "would require the imposition of significant burdens on other[s]" cannot be reconciled

[5] https://www.nytimes.com/live/2020/11/27/world/covid-19-coronavirus/us-public-school-enrollment-drops-as-parents-frustrated-by-lockdown-pull-their-children-out.

with the Establishment Clause. *Est. of Thornton v. Caldor, Inc.,* 472 U.S. 703, 710 (1985).

Here Establishment Clause problems reinforce that there is no discrimination against free exercise: Kentucky treats all schools, whether religious or not, the same. Applicants' preferred remedy would transform a policy of religious neutrality into one of religious favoritism. Correct application of settled free exercise law avoids that perverse—and Establishment Clause-violating—result.

CONCLUSION

The Application should be denied.

Respectfully submitted,

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